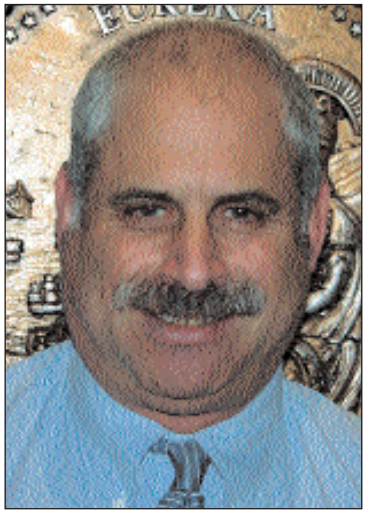
Where the Color of Law Is Orange:

The Decisions of a Single Court Reveal the Forces Shaping Recent California History

By Robert S. Wolfe



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The California Court of Appeal, now in its 100th year, is one of the oldest intermediate appellate courts in the country. The court's creation in April 1905 was a major (albeit unheralded) infrastructure development in early 20th century California history. The court serves as a filtration system for appellate litigation, treating about 95% of the cases, and leaving only a select few to be considered in depth by the California Supreme Court.

One particular geographic oddity of the Court of Appeal bears further analysis. Of its 105 sitting appellate justices, only eight serve in a single standalone division for a single county. The jurisdiction of the Court of Appeal, Fourth District, Division Three starts and stops at the Orange County line. No other appellate court is so circumscribed with one division for one county.

A topical history of the Santa Ana Court of Appeal provides a microcosm of how a court both shapes and is shaped by its environs.

— A Founding Steeped in Politics —

Orange County initially was part of Los Angeles County. An 1870 effort to create a "County of Anaheim" died after passing the Assembly. Not until 1889 did the Legislature authorize Orange County's secession if ratified by two-thirds of its voters. But it took a decision by the California Supreme Court to establish that the Legislature had not unlawfully delegated its powers. *People ex rel. Graves v. McFadden*, 81 Cal. 489 (1889).

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The new county was nothing if not parsimonious. J.W. Towner, the county's first judge, sued the county for failing to comply with a state law requiring a law library. The supervisors grudgingly put up some book shelves in the county clerk's office, but they were "obstructed and rendered greatly inconvenient by furniture and other articles...." The Supreme Court ordered the supervisors to provide a separate room for the library. *Board of Law Library Trustees of Orange County v. Board of Supervisors of Orange County*, 99 Cal. 571, 572 (1893).

Although Orange County was politically independent, it became tied at the hip with Los Angeles when the Court of Appeal began operating in April 1905. Orange County was included within the Second District, whose three justices covered a vast expanse from the Central Valley to the Mexican border.

In 1929, Orange County was moved to the new Fourth Appellate District, a circuit-riding court. Again, Orange County was short-circuited. Fresno, San Bernardino and San Diego were chosen instead as the host sites.

By 1967, Orange County had become the second largest county, with a population of 1.4 million. Still, its lawyers and litigants had to travel elsewhere to have their cases heard. And, of the 27 justices who sat on the Fourth District between 1929 and 1982, only four were from Orange County.

County leaders began lobbying for a separate appellate court as far back as 1971, when supervisors voted to deed the county's outdated red sandstone courthouse to the state for use as an appellate court. The offer was rejected __ a good thing, in retrospect, since it turns out the county did not own the building.

By 1980, the county had two million residents, and civic boosters intensified their efforts for their own court. To sweeten the pot, they offered to raise private funds to cover some expenses. This apparently worked. The enabling legislation expressly prohibited the use of state funds for the court's law library. The new Fourth District, Division Three was born, effective February 1982. Stats. 1981, ch. 959.

Or was it? In February 1982, a taxpayers' group convinced a Sacramento judge to issue a permanent injunction enjoining any gubernatorial appointments. The ostensible grounds? By requiring private funding, the Legislature violated the separation of powers. A real motivating factor? Termed-out Democratic Governor Edmund G. ("Jerry") Brown, already reviled for selecting Chief Justice Rose Bird, would fill the four judicial slots for the conservative county.

The appeal went directly to the California

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Supreme Court. On November 1, 1982, the court, by a 4-3 vote, vacated the injunction. The majority concluded the issue of judicial independence was mooted when the Legislature allocated $209,480 for the court's law library. *Brown v. Superior Court*, 33 Cal. 3d 242, 246 (1982).

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The 1982 gubernatorial election occurred the next day, with the Republican candidate, Attorney General George Deukmejian, narrowly defeating the Democratic candidate, Los Angeles Mayor Tom Bradley. Two weeks later, also on a 4-3 vote, the Supreme Court voted to accelerate the finality of its opinion because "this lawsuit has long enough delayed the implementation of responsibilities that our Constitution entrusts to the Legislature." Id. at 258. Dissenting justice Frank Richardson chastised his colleagues for ordering immediate finality for "unspoken reasons." *Id*. at 260.

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As expected, Brown made four midnight appointments to the court. And Deukmejian cast the lone "no" vote in his capacity as a member of the Commission on Judicial Appointments. Deukmejian objected to the nominees' refusal to answer questions on judicial philosophy, including their position on the death penalty.

On January 3, 1983, Presiding Justice John K. ("Jack") Trotter, Jr. hosted the court's first meeting around his kitchen table. Justices Edward J. Wallin, Sheila Sonenshine, and Thomas F. Crosby, Jr. withstood the heat in Jack Trotter's kitchen. The court conducted its first oral argument in the Santa Ana City Council chambers.

While the court never moved into the Old County Courthouse, the court ultimately found its way to a building on Spurgeon Street, named after the man, William H. Spurgeon, who founded Santa Ana and sold the lot (for $8,000) on which the old county courthouse was built. By 2008, the court is scheduled to move to a new facility on Ross Street, named after the man, Jacob Ross, Sr., who sold the land to Spurgeon.

— A Decidedly Unpartisan Court —

Despite the highly politicized nature of its birth, the new "4-3," its ranks filled and ex-

panded with new appointees during the succeeding Republican and Democratic administrations, never took on a political cast.

Deukmejian eventually got three appointments to the court, including two presiding justices, Harmon G. Scoville, and David G. Sills, who was appointed in 1990 upon Scoville's retirement. The third Deukmejian appointee, Henry T. Moore, Jr., died in 1994. Governor Pete Wilson not only signed bills, but appointed them also, selecting William F. Rylaarsdam in 1995 and William W. Bedsworth in 1997. Governor Gray Davis had five appointments: Kathleen E. O'Leary, Eileen C. Moore, Richard M. Aronson, Richard D. Fybel, and Raymond J. Ikola.

If there is a consistent strain among the 14 men and women who have served as justices over the court's nearly 25 year history, it is a commitment to a responsive and transparent legal process — whoever's ox is being gored. As Justice Crosby put it, quoting songwriter Jim Croce, "'Sometimes you eat the bear, and sometimes the bear eats you.'" *Long v. Valentino*, 216 Cal. App. 3d 1287, 1290, fn. 1 (1989).

This was demonstrated in one of the new court's first cases. In *Grillo v. Smith*, 144 Cal. App. 3d 868 (1983), the court affirmed a summary judgment for the Los Angeles Times, sued for libel for editorializing that a municipal judge ran a "kangaroo" court. "A newspaper is perfectly free to…criticize judges for violating the rights of innocent persons and exceeding their authority." *Id*. at 875.

A year later, the court directed county officials to disclose to the Orange County Register the terms of a confidential settlement of a jail misconduct lawsuit because of "the public interest in finding out how decisions to spend public funds are formulated…." *Register Div. of Freedom Newspapers, Inc. v. County of Orange*, 158 Cal. App. 3d 893, 909 (1984).

The court's evenhanded approach was exemplified in *Long v. Valentino, supra*, when the court's two Brown appointees ruled against an ACLU attorney who was sued for ejecting a Newport Beach police officer from a public forum at a local high school. (The forum ironically happened to be on police surveillance of public meetings.) Despite this, the court held that the Unruh Civil Rights Act covered on-duty police officers. "We find defendants' position…to be as reprehensible as the police abuses decried above." *Id*. at 1298.

'The "4-3's" decisionmaking simply does not break down along partisan lines. To quote Justice Sills (quoting Yogi Berra), "The umpire ain't ruled until he's ruled…."'

In like fashion, in *Daily Journal Corp. v. Superior Court*, 75 Cal. Rptr. 2d 819 (1998),

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review granted and judgment reversed by *Daily Journal Corp. v. Superior Court*, 20 Cal. 4th 1117 (1999), two of the court's Republican appointees roiled financial and political establishments by holding that the court had inherent power to compel public disclosure of a secret grand jury investigation into the county's bankruptcy. "This case arose out of a financial disaster of historic proportion. Literally millions of people were affected, jobs were lost, school funds endangered, $1.67 billion dollars in public monies vaporized." *Id*. at 825.

Similarly, the court's most important opinion on the value of *pro bono* legal work came from Justice Rylaarsdam, a Wilson appointee. In *Do v. Superior Court*, 109 Cal. App. 4th 1210 (2003), the court held that volunteer attorneys could recover their attorney fees as discovery sanctions. "A rule that would make discovery abuse by the opponent more likely where lawyers donate their time would discourage performance of such worthy service." *Id*. at 1214.

And it was the court's Republican-appointed justices who authored opinions supporting such disfavored causes as "adult" businesses, inclusionary zoning and sexual orientation discrimination. *City of Stanton v. Cox*, 207 Cal. App. 3d 1557 (1989) (invalidating anti-porn zoning ordinance); *Briseno v. City of Santa Ana*, 6 Cal. App. 4th 1378 (1992) (invalidating Santa Ana occupancy limits for apartment houses); *People v. Garcia*, 77 Cal. App. 4th 1269 (2000) (reversing burglary conviction where two lesbians excluded as jurors).

The "4-3"'s decisionmaking simply does not break down along partisan or predictable lines. To quote Justice Sills (quoting Yogi Berra), "'The umpire ain't ruled until he's ruled.'" *City of Stanton*, *supra*, at 1564.

— No Procedural Shortcuts —

Orange County's explosive population growth continued throughout the latter half of the 20th Century — to the point where, as one justice remarked, "finding a parking space can be the highlight of one's day..." *Wilson v. City of Laguna Beach*, 6 Cal.

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App. 4th 543, 546 (1992) (invalidating local ordinance against "granny flats"). Backlogged trial judges, in particular, looked for ways to lighten their loads and speed up the process.

While acknowledging unenviable dilemmas, the Court of Appeal refused to subordinate due process to speed. The court's decisional law during the last decade is remarkable in its consistent insistence on maintaining — and promoting — traditional safeguards for a fair and open government. This includes the following:

Settlement conferences require personal client involvement. Trial judges may compel personal participation by high-ranking officials to allow "meaningful communication with the court" at settlement conferences. *Sigala v. Anaheim City School Dist.*, 15 Cal. App. 4th 661, 668 (1993). "Judges experienced in conducting settlement conferences have all too frequently encountered the busy CEO…who has never grasped the risks inherent in the litigation until literally forced to do so by a judge." *Id.* at 675.

Judges should hold oral hearings. Dispositive motions require oral hearings where counsel has the opportunity to persuade the court through the give-and-take of questioning. "There is a reason why litigants are afforded their proverbial 'day in court' — to speak directly to the decisionmaker." *Mediterranean Construction Co. v. State Farm Fire & Casualty Co.* 66 Cal. App. 4th 257, 267, fn. 11 (1998). "We do not subscribe to the obscurantist notion that justice, like wild mushrooms, thrives on manure in the dark." *Titmas v. Superior Court*, 87 Cal. App. 4th 738, 741 (2001)

Some trials can be too speedy. It took a high profile case to bring this point home. In one of several cases to follow the O.J. Simpson "trial of the century," an Orange County judge returned custody of the children in a guardianship termination case, without considering evidence he murdered the children's mother. The court reversed: "Judges cannot avoid the single most important and relevant issue in a case…just because trying that issue will take time. The standard is whether

the consumption of time is 'undue.'" *Guardianship of Simpson*, 67 Cal. App. 4th 914, 921 (1998).

The court reiterated these concerns in invalidating local procedures to streamline trial proceedings. "The moral to the story is that haste makes for a lower affirmance rate." *Panico v. Truck Ins. Exchange*, 90 Cal. App. 4th 1294, 1296 (2001) (criticizing bench adjudications based on offers of proof); *Sierra Craft, Inc. v. Magnum Enterprises, Inc.*, 64 Cal. App. 4th 1252 (1998) (overturning local rule allowing summary judgments without a motion).

Informal justice may produce injustice. In variations on a similar theme, the court has invalidated "[i]ll-conceived shortcuts" which "often raise more questions than they purportedly resolve." *Heenan v. Sobati*, 96 Cal. App. 4th 995, 1003 (2002) (sitting judges cannot engage in private arbitrations); see also *In re Marriage of Hall*, 81 Cal. App. 4th 313, 319 (2000) (disapproving the "all-too-common pattern in family law of lawyers disappearing into a judge's chamber and emerging with the judge's order, independent of any hearing or settlement").

Parties should not get sandbagged. Newly named parties in ongoing litigation must have adequate time for discovery and pre-trial motion work, notwithstanding local fast-track rules. *Polibrid Coatings, Inc. v. Superior Court*, 112 Cal. App. 4th 920 (2003); *see also San Diego Watercrafts, Inc. v. Wells Fargo Bank*, 102 Cal. App. 4th 308 (2002) (reply papers cannot be used for the first-time introduction of new facts in summary judgment motions).

— In the Shadow of Los Angeles —

Orange County, having been wrested Athena-like, from Los Angeles County, bore an uneasy relationship with its parent. Early on, the two counties squabbled in court over unallocated revenues and costs antedating the split. *Los Angeles County v. Orange County*, 97 Cal. 329 (1893); *Orange County v. Los Angeles County*, 114 Cal. 390 (1896).

'While growth has endangered a vibrant and self-confident urbanism, it also has endangered common urban ills as sprawl, street gangs and homelessness. Some of the court's leading opinions have dealt with such problems.'

Ongoing tensions between the two entities occasionally spilled into appellate decisions. In *Patrick v. Superior Court*, 27 Cal. Rptr. 2d 883 (1994), opn. ordered nonpub., the court dismissed a libel action brought by the

presiding judge of the L.A. superior court, who was caricatured as a "despotic twit," presiding "over activities more associated with a brothel than a courthouse." The majority ruled the memo was constitutionally protected parody: "It is unreasonable to believe that any judge appointed…in this century would be so stupid as to *seriously* author such a memo." *Id*. at 888. Not so fast, wrote the dissent — we are speaking about *Los Angeles*, where "stranger, much stranger, things have come from Los Angeles judges." *Id*. at 893.

In *In re Antonio R.*, 78 Cal. App. 4th 937 (2000), the court affirmed a probation order requiring a minor to stay away from L.A. County. There was no constitutional violation, even though "the minor may not, without prior permission or with his parents, visit the Getty Museum. Flexing or gawking at Muscle Beach is prohibited. He may not take in a basketball game at Pauley Pavilion, nor a college football game at the Coliseum." *Id*. at 942.

Most recently, in *City of Anaheim v. Superior Court* (June 27, 2005, G035159) (nonpub. opn.), the court was called upon to determine whether the Anaheim Angels could rename themselves the "Los Angeles Angels of Anaheim." Were Los Angeles and Orange County "mutually exclusive" geographical areas, or is one a "mere hiccup" of the other? By a 2-1 split, the court declined to resolve such existential issues at the preliminary injunction stage.

— A Field of Dreams —

They will come, whether or not you build it. Growth — and the accommodation of growth — have been the cause and focus of Orange County (now three million residents) and its appellate court (now eight justices).

While growth has engendered a vibrant and self-confident urbanism, it also has engendered common urban ills as sprawl, street gangs and homelessness. Some of the court's leading opinions have dealt with such problems. *See, e.g., Atherton v. Board of Supervisors*, 146 Cal. App. 3d 346 (1983) (rejecting environmental challenge to Foothill Toll Road); *People v. Rodriguez*, 21 Cal. App. 4th 232, 239 (1993) (criticizing investigatory stops to photograph suspected gang members); *In re Eichorn*, 69 Cal. App. 4th 382 (1998) (allowing homeless man to raise "necessity" defense based on lack of shelter beds). As relationships have become more complex than 1950's suburban prototypes, the court has had to grapple with high-tech legal dilemmas running from birth to death. *In re Marriage of Moschetta*, 25 Cal. App. 4th 1218 (1994) (enforceability of contracts for surrogate births); *In re Christopher I.*, 106 Cal. App. 4th 533 (2003) (withdrawal of life support for severely abused child). The court has been modest in its approach and cautious in controlling outcomes, still, it recognizes that appellate judging "is most definitely not a spectator sport." *Guardianship of Simpson, supra*, at 935.

The court has been around the block long enough to see trends come and go, witness the litigation surrounding the arrival of the L.A. Rams to Orange County, *Golden West Baseball Co. v. Talley*, 232 Cal. App. 3d 1294 (1991), and the litigation surrounding the team's departure. *Charpentier v. Los Angeles Rams Football Co.*, 75 Cal. App. 4th 301 (1999). Ultimately, as the court has concluded, some things are beyond the control of the law: "[P]laintiff did not buy the right to watch a good team…." *Id*. at 314.

Despite these inherent limitations on the judicial power, litigants whose disputes require appellate resolution can have one justifiable expectation based upon the Fourth District, Division Three's relatively brief history: their disputes will be resolved on a level playing field, bathed in plenty of Orange County sunlight.